

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

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| In re: |) | Bankr. No. 99-41111 |
| |) | Chapter 7 |
| PHYLLIS R. BITTERMAN |) | |
| Soc. Sec. No. 504-54-2550 |) | DECISION RE: DISMISSAL |
| |) | OF CASE UNDER § 707(b) |
| Debtor. |) | |

The matter before the Court is the Motion to Dismiss for Substantial Abuse filed by the United States Trustee. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Decision and accompanying Order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that Debtor's case must be dismissed.

I.

Phyllis R. Bitterman ("Debtor") filed a Chapter 7 petition. On her Schedule I, Debtor stated she had net monthly take-home pay of \$3,922.26. Her itemized monthly expenses on Schedule J totaled \$4,231.07. The expenses included \$303 for home maintenance, lawn care, and snow removal, \$325.20 for a cleaning person, hair and nail care, and veterinary care and pet supplies. Her monthly expense for telephone service was listed at \$381.32 and transportation was at \$162.67. She also set forth that she had unreimbursed business expenses of \$470.15 per month for office rent, travel expenses, and a life insurance policy. According to Debtor's Statement of Financial Affairs, her annual income and reimbursed business expenses has averaged over \$71,000 since 1997. Debtor's unsecured, non priority claims total \$76,588.43. All are for goods and services except for three claims of unknown amounts

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arising from an auto accident-related lawsuit. She listed Ryan Bitterman as a co-debtor on a claim secured by a 1996 Chevrolet Jimmy. Her major assets are a home and some IRA accounts¹. Both were declared exempt without objection.

The United States Trustee filed a motion to dismiss under 11 U.S.C. § 707(b) on the grounds that granting this Debtor relief would be a substantial abuse of the Chapter 7 bankruptcy process. The United States Trustee argued that Debtor had understated her monthly income and that some of Debtor's expenses were unreasonable. With income correctly stated and with appropriate expenses deducted, the United States Trustee argued that Debtor should have disposable income of over \$1,000 per month to pay creditors under a Chapter 13 plan. With this monthly payment, the United States Trustee argued that Debtor could pay 60% of her unsecured debt over a three-year plan or 100% of her unsecured debt over a five-year plan.

Debtor filed a response stating any wage increase she had recently received was offset by an increased cost of living. She also argued that all her expenses are reasonable and necessary. She noted that several expenses arise from requirements for her job or from certain health problems she has.

An evidentiary hearing was held. Appearances included

¹ Though it was not considered herein, the Court notes that the recent decision of the Court of Appeals in *Taylor v. United States (In re Taylor)*, 212 F.3d 395 (8th Cir. 2000), may cause Debtor's ERISA qualified IRA accounts to be considered income available to fund a Chapter 13 plan.

Assistant U.S. Trustee Bruce J. Gering and Cecelia A. Grunewaldt for Debtor.

Craig Bumann, a Certified Public Accountant who is employed by the United States Trustee as a bankruptcy case analyst, presented a summary of Debtor's expenses at the level his office requests that the Court allow. He used Debtor's Schedule J as base. He also relied on a letter between counsel dated February 11, 2000 and Debtor's testimony at the § 341 meeting of creditors. Bumann separated Debtor's business telephone costs from personal telephone costs and itemized only the personal costs. He eliminated one-time household maintenance expenses described in the February letter, including chair repair, lawn mower repair, and the purchase and installation of a water softener. He eliminated expenses for chemical lawn service, snow removal, and tree and shrub trimming, since Debtor's 20-year old son lives in the home and presumably could perform these duties. Bumann also reduced Debtor's personal expenses by \$110 for a YWCA membership and some office supplies. He left in \$184 per month for personal care items and \$205 per month for food. Bumann separated personal transportation expenses from business and included only the personal expenses. He deducted the expense for an auto payment since the subject vehicle is registered in Debtor's and her son's names and Debtor has a company car. He also reduced a monthly payment to Sears to \$0 since no reaffirmation agreement had been filed. To calculate Debtor's allowed unreimbursed monthly business expenses of \$811, Bumann relied on Debtor's amended 1999 federal income tax return, deeming

it the most reliable information, and divided it by 12 for a monthly expense of \$811.08. Bumann eliminated Debtor's monthly expense for a cleaning lady, bi-weekly expense for nail care, and weekly hair care expense for a shampoo and set. He left in an expense for regular hair cuts and permanent waves. He eliminated an expense for pet care since no pet had been scheduled.

With these changes, Bumann calculated that Debtor's reasonable monthly expenses should total no more than \$3,301.88. Based on Debtor's present monthly income of \$4,284.82 (calculated by Bumann from Schedule I and § 341 meeting testimony), he concluded Debtor's monthly disposable income available to pay unsecured creditors in a Chapter 13 plan was \$982.94.²

Stan Frank, who is employed as a labor union representative, as is Debtor, and who previously held Debtor's position, reviewed what financial commitments are entailed in their job. He stated that he and Debtor are expected to attend local union meetings, arbitrations, labor negotiations, and council meetings. He said a primary duty is to organize new units. This includes making telephone calls, meeting with interested workers, and holding organizational meetings and elections. Frank says they address grievances, file necessary complaints, and do appropriate follow-up work. He said he is expected by his employer to dress professionally and be well-groomed. He stated that he receives a

² Bumann's conclusions, with a modification to reflect an increase in the allowed, unreimbursed monthly business expenses to \$811.08 that he re-calculated, were summarized on Exhibit 3.

salary from the union and reimbursement for some expenses, which includes use of a company car. Frank said he also has a personal vehicle and that he understood that the union required him to maintain this backup vehicle should his company car be out of service. Business-related expenses that he said are not reimbursed include maintaining a labor law library, renting an office and meeting space, purchasing meals for others during meetings, contributing to local units' fund-raising projects, and buying donuts, coffee, and other supplies for picket lines. He stated that Debtor's office space and library are similar to what he has and reflects what she needs.

Debtor took the stand and reviewed several of the expenses that the United States Trustee had questioned. She said she is reimbursed for her basic telephone charge at home and any long distance calls from home, but she must pay for her office phone. She stated she has physical limitations due to allergies and prior injuries. She said her son also has allergies. Consequently, neither mows the lawn or trims trees and bushes; it is hired done, as is chemical lawn applications. She said she also hires snow removal done since she is out of town 11.2 days per month (year round), her son leaves for work early, and her son is out of town two days a month (generally in the summer). Debtor said her son pays for all tires, normal maintenance, and repairs and his own gas on their shared automobile. Debtor makes the car payments and pays for the insurance, some of her own gas, and a monthly car wash. Her son has a small monthly income as an electrician (not

quantified), but he does not contribute anything to the household expenses. He does some chores, such as helping her load her car and doing minor repairs. Debtor said some business expenses on her 1999 federal income tax return and her amended 1999 federal income tax returns are understated. She said the reason is because the preparer talked her out of itemizing everything since she was already slated to receive a large refund.

II.

Section 707(b) of the Bankruptcy Code permits the dismissal of a Chapter 7 case upon a showing that granting the debtor relief would be a substantial abuse of the Bankruptcy Code. The section is intended to promote fairness to creditors and prevent the use of Chapter 7 by unneedy debtors. *Stuart v. Koch (In re Koch)*, 109 F.3d 1285, 1288 (8th Cir. 1997). "Substantial abuse" is not defined within the Bankruptcy Code. In interpreting the section, the Court of Appeals for the Eighth Circuit has held that the primary inquiry is whether the debtor has the ability to pay creditors under a Chapter 13 plan. *Id.* (citing *In re Walton*, 866 F.2d 981, 983 (8th Cir. 1989)); *Nelson v. Siouxland Federal Credit Union (In re Nelson)*, 223 B.R. 349, 353 (B.A.P. 8th Cir. 1998). A debtor's ability to pay is measured by evaluating the debtor's financial condition in a hypothetical Chapter 13 case. *Id.* The analysis includes the expectation that the debtor will put forth his best effort in a Chapter 13 plan. *In re Shelley*, 231 B.R. 317, 319 (Bankr. D. Neb. 1999); *In re Beauchamp*, Bankr. No. 97-50487,

slip op. at 6 (Bankr. D.S.D. May 28, 1998) (citing *Hagel v. Drummond* (*In re Hagel*), 184 B.R. 793, 798 (B.A.P. 9th Cir. 1995), and *In re Schnabel*, 153 B.R. 809, 818 (Bankr. N.D. Ill. 1993)).

Several bankruptcy courts have addressed the question of whether support of adult children is an allowed expense in a Chapter 13 analysis.³ As discussed in the several cases summarized in *In re Mendelsohn*, Bankr. No. 98-40099, slip op. (Bankr. D.S.D. Nov. 10, 1998), different results have been reached in light of the particular circumstances presented. In most cases, luxury or excessive expenses, which may include support of adult children, were found not "reasonably necessary." *Id.* at 7-9. In contrast, a legal obligation to support an adult child was allowed. *Id.* at 8 (citing *In re Mastromarino*, 197 B.R. 171, 178-79 (Bankr. D. Me. 1996)).

III.

As this Court discussed in *Mendelsohn*, slip op. at 10-11, not all expenditures by a family take priority over paying creditors. When a debtor lives beyond his or her means and makes no effort to reduce non essential expenses and pay creditors, a substantial abuse of the bankruptcy process occurs. That is what has happened in this case.

Debtor's monthly budget includes many discretionary expenses,

³ Neither the United States Supreme Court nor the Court of Appeals for the Eighth Circuit have directly addressed this issue.

including hired cleaning help (\$120), cable television (estimated \$34), professional nail care (\$140), hired snow removal (\$18), and providing a vehicle (estimated \$50 reduction for insurance and gas based on costs discussed in February letter) and a cost-free home (estimated \$200 in lieu of rent) for an adult son. Further, Debtor's union position, while the source of a very good income, also generates unreimbursed business-related expenses (average of \$811.08 per month) that she has exhibited a limited ability to manage. Some of these household and business expenses could be reduced or eliminated to free up at least \$500 per month for Chapter 13 plan payments.

The Court notes that it did not find unreasonable or excessive all the same expenses that the United States Trustee did.⁴ Debtor's expenses for pet care and food are not unreasonable; that one small pet was not scheduled as personal property is immaterial⁵, assuming the animal was not valuable. Some costs eliminated by the United States Trustee as one-time maintenance or repair costs may actually reflect Debtor's average expenditure for household upkeep. In contrast, however, the purchase and installation of a water softener, carpet cleaning, and tree and shrub trimming are appropriately not included in the monthly

⁴ The Court would have inquired further about the legitimacy of Debtor's claim that her sponsorship of a softball team is a charitable contribution as governed by 11 U.S.C. §§ 707(b) and 548(d)(3) and (4).

⁵ Scheduling all pets is the better course. Debtor should also have scheduled her jewelry and luggage, regardless of income.

average home maintenance expense since they are all irregular expenses. In sum, more detailed evidence would be needed to accurately calculate an average monthly home maintenance cost.

The Court also could not automatically deem some expenses Debtor incurs as reasonable when the only supporting evidence of their necessity was her testimony. For example, the only evidence of Debtor's and her son's respective medical conditions that are claimed to limit some of their activities was Debtor's self-serving testimony. Such unsupported testimony does not go far in justifying the large expenses for lawn and yard care, housecleaning, and snow removal because of unique hardships. See *Walton*, 866 F.2d at 983. Further, her explanations regarding the inaccuracies or omissions in her tax returns regarding unreimbursed business expenses carry less weight than the signed, filed returns themselves.

When all the evidence is considered, it is clear that Debtor's good income and moderate fixed expenses allow her substantial discretionary funds each month. Her first choice on how to spend these discretionary funds cannot, in good faith, be to let creditors go unpaid. *United States Trustee v. Harris*, 960 F.2d 74 (8th Cir. 1992) (citing *Walton*, 866 F.2d at 983)); *Mendelsohn*, slip op. at 10-11. Debtor is not needy. *Walton*, 866 F.2d at 983. While she may not be able to pay creditors in full through a Chapter 13 plan, she can fund a plan with at least \$500 per month. This sum would generate a measurable dividend for unsecured

creditors. See *In re Praleikas*, 248 B.R. 140, 145 (Bankr. W.D. Mo. 2000); *In re Schmidt*, 200 B.R. 36, 38-39 (Bankr. D. Neb. 1996). Therefore, her Chapter 7 case must be dismissed for substantial abuse. Debtor will be given until July 11, 2000 to voluntarily convert to Chapter 13. If not, an order dismissing her case will be entered.

Dated this 27 day of June, 2000.

BY THE COURT:



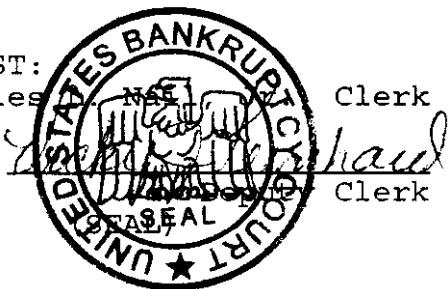
Irvin N. Hoyt
Bankruptcy Judge

ATTEST:

Charles

Clerk

By:



Clerk

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

JUN 27 2000

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

I hereby certify that a copy of this document
was mailed, hand delivered, or faxed this date
to the parties on the attached service list.

JUN 27 2000

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota

By _____

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Total notices mailed: 4

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